

Decisions of Interest

APRIL 3, 2023

CRIMINAL

SECOND DEPARTMENT

People v Rabidou | March 29, 2023

WOA | OVERLY BROAD | INVALID

The defendant appealed from a sentence rendered by Queens County Supreme Court after his guilty plea. The Second Department affirmed. The sentence was not harsh and excessive, but the waiver of appeal was invalid. The written waiver mischaracterized the rights being forfeited as encompassing the right to counsel and poor person status, and as an absolute bar to all postconviction relief, including relief pursuant to CPL 440.10 and 440.20.

[People v Rabidou \(2023 NY Slip Op 01692\)](#)

Matter of Maria S. v Tully | March 29, 2023

ARTICLE 78 | CPL 440.47 | NO PROHIBITION

The petitioner commenced a CPLR Article 78 proceeding seeking to prohibit a justice of the Kings County Supreme Court and the Kings County DA from enforcing a judicial subpoena. The subpoena directed the NYS Office of Mental Health to produce certain mental health records for in camera inspection in relation to the petitioner's CPL 440.47 application. The Second Department denied the petition and dismissed the proceeding. Issuance of the subpoena was not "an unlawful use or abuse of the entire action." The petitioner placed her mental health at issue in her application—if issuing the subpoena was an error, it would constitute an error related to the proper purpose of the proceeding.

[Matter of Maria S. v Tully \(2023 NY Slip Op 01680\)](#)

TRIAL COURTS

People v Turner | 2023 WL 2721707

CPL 440.10 & 440.30 | NEW TRIAL ORDERED

The defendant moved pursuant to CPL 440.10 and 440.30 for a new trial or dismissal based on newly discovered evidence. After a hearing, Richmond County Supreme Court ordered a new trial. The defendant had been convicted of multiple felony offenses based on his assistance of a codefendant in an armed robbery of a barber shop. The codefendant was a fugitive at the time of the defendant's trial but pleaded guilty to the robbery after the defendant was sentenced. Later, the codefendant swore in an affidavit that he did not know the defendant, whom he had ordered to help with the robbery at gunpoint. The codefendant testified to these facts at the 440 hearing and was willing to

testify at a trial. This constituted newly discovered evidence which would probably change the result of a new trial, but it did not establish the defendant's actual innocence. Gary R. DeFilippo represented the defendant.

[People v Turner \(2023 NY Slip Op 23084\)](#)

People v Caisaguano | 2023 WL 2671051

DWAI | *DE BOUR* | PARKED CAR

Following a *Dunaway/Johnson* hearing, Queens County Criminal Court suppressed all evidence flowing from the unlawful seizure of the defendant. After receiving a report of an accident, two police officers approached the defendant's illegally parked car. The defendant was awake and in the driver's seat. The officers told him to exit the car and hand over his keys. The defendant spoke clearly and showed no signs of impairment. While these circumstances gave police reason to approach the car and request information (*De Bour* level 1), they were not just justified in directing the defendant out of his car and seizing his keys (*De Bour* level 3). Further, the officer's testimony was contradicted at times by his body cam footage—notably as to whether the defendant smelled like alcohol. Thus, suppression of all evidence flowing from the defendant's unlawful detainment was required. The Legal Aid Society of NYC (Edward Franco-Lopez and David Ocasio, of counsel) represented the defendant.

[People v Caisaguano \(2023 NY Slip Op 50233\[U\]\)](#)

People v Holiday | 2023 WL 2721704

INFORMATION | FACIALLY INSUFFICIENT | DISMISSED

New York County Criminal Court dismissed as facially insufficient a misdemeanor information charging the defendant with two counts of forcible touching. The information provided the incorrect the date of the incident giving rise to the defendant's charges. Although the defendant did not raise this specific issue, the facial sufficiency of a charging instrument is nonwaivable and jurisdictional and can be addressed sua sponte by the court. The People could have corrected their error by filing a superseding information but, having failed to do so before filing the initial COC/SOR, dismissal was required. NY County Defenders Services (April White-Small and Aaron Ratoff, of counsel) represented the defendant.

[People v Holiday \(2023 NY Slip Op 50250\[U\]\)](#)

People v Melchiorre | 2023 WL 2640201

SORA FACTORS | NOT APPLICABLE TO ANIMAL VICTIMS

At the defendant's sex offender risk assessment hearing, the People contended that the defendant should be designated a risk level two and sought the assessment of points on factors 2 (sexual contact with victim), 6 (other victim characteristics), and 7 (relationship with victim). They alternatively sought an upward departure. Queens County Criminal Court designated the defendant a risk level one and denied the People's request for an upward departure. The defendant was convicted of sexually abusing a dog, and the RAI factors cannot be directly applied in cases involving sexual abuse of an animal. Among other things, the RAI was not calibrated to determine how an offender's abuse of an animal might correlate to the risk of reoffense against a person. Henry A. Martuscelo represented the defendant.

[People v Melchiorre \(2023 NY Slip Op 50227\[U\]\)](#)

People v Jawad | 2023 WL 2701447

COC & SOR INVALID | POLICE MISCONDUCT RECORDS

The defendant moved for an order deeming the People's COC and SOR invalid. Queens County Criminal Court granted the motion. A letter summarizing an officer's disciplinary records does not satisfy the People's discovery obligation—the records themselves must be provided. Even if the People do not intend to call an officer to testify, the officer's disciplinary records must be disclosed because they could assist the defense in other ways. The Legal Aid Society of NYC (Alan Gordon, of counsel) represented the defendant.

[People v Jawad \(2023 NY Slip Op 50244\[U\]\)](#)

People v Vergara | 2023 WL 2701425

SEARCH WARRANT | PROBABLE CAUSE | SUPPRESSED

Richmond County Supreme Court granted in part the defendant's motion to controvert a search warrant and suppressed any evidence recovered from his cell phone. The search warrant application stated that there was reasonable cause to believe that evidence of an assault may be found on the defendant's cell phone—but the application was devoid of any factual allegations linking the phone to the charged crime. The People therefore failed to satisfy their burden of establishing probable cause to believe that evidence of the crime would be found on his phone. The Legal Aid Society of NYC (Stephanie Pope, of counsel) represented the defendant.

[People v Vergara \(2023 NY Slip Op 23083\)](#)

People v Morgan | 2023 WL 2640206

CPL 420.45 | FRAUDULENT DEED | VOID AB INITIO

The People moved pursuant to CPL 420.45 to have a deed that was fraudulently executed in connection with the defendant's conviction of 2nd degree offering a false instrument for filing declared void ab initio. Following a hearing, Queens County Supreme Court granted the motion. The hearing proof did not rebut the statutory presumption that the deed was void ab initio based on the defendant's related conviction (see CPL 420.45 [3]). The statute does not require a forgery conviction—only a conviction for 1st or 2nd degree offering a false instrument for filing triggers the right to seek relief. The duped purchaser and lending agent had other avenues to seek compensation for their losses but, if the court declined to declare the deed void ab initio, the true owner would face expensive, protracted civil litigation to undo the fraudulent conveyance.

[People v Morgan \(2023 NY Slip Op 23077\)](#)

People v Bay | 2022 WL 19331926

COC & SOR | VALID | SANCTION INSTEAD OF DISMISSAL

The defendant appealed from a Cortland City Court judgment convicting him of 2nd degree harassment after a nonjury trial. Cortland County Court affirmed. The People's SOR was not illusory even though they did not disclose a 911 recording, a DIR, and a police report until after their speedy trial time had expired. The People did not believe that the missing items existed but—after inquiry prompted by defense counsel's repeated requests—learned that they did and provided them soon thereafter. City Court properly found that the People's failure to timely disclose the missing items did not invalidate their COC, but warranted the sanction of preclusion of the 911 recording at trial. The People acted in

good faith and with due diligence. [\[NOTE: The Court of Appeals granted the defendant leave to appeal on Feb. 15, 2023 \(39 NY3d 1077\)\]](#). The Cortland County Public Defender (Kayla Hardesty, of counsel) represented the appellant. [People v Bay \(2022 NY Slip Op 22413\)](#)

FAMILY

SECOND DEPARTMENT

Matter of Bendter v Elikwu | March 29, 2023

CUSTODY PETITION | HEARING REQUIRED | REVERSED

The father appealed from a Kings County Supreme Court order that summarily granted the mother's petition for custody of their child. The Second Department reversed and remanded. Supreme Court erred when it made a custody determination without conducting a hearing or an inquiry into the best interest of the child. Tammi D. Pere represented the father.

[Matter of Bendter v Elikwu \(2023 NY Slip Op 01670\)](#)

Matter of Johnson v Lomax | March 29, 2023

WITHDRAWAL OF PETITION | STIPULATION REQUIRED

The petitioner appealed from a Suffolk County Family Court order that vacated a temporary order of protection and directed that the underlying family offense petition was withdrawn. The Second Department dismissed the appeal related to the order of protection as academic and reversed and reinstated the petition. After a hearing, Family Court found that the respondent committed a family offense. Once a matter has been submitted to the court, it may not be discontinued without the stipulation of all parties. Since there was no such stipulation, the court erred by directing that the petition was withdrawn. Arza Rayches Feldman (Steven A. Feldman, of counsel) represented the appellant.

[Matter of Johnson v Lomax \(2023 NY Slip Op 01675\)](#)

TRIAL COURT

Matter of Caleb S. (Gina R.) | 2020 WL 13664254

1028 HEARING | CHILDREN RETURNED

The respondent parents requested a 1028 hearing after ACS filed a neglect / abuse petition alleging that the mother abused the 3-month-old subject child and derivatively abused her older daughter, based on the discovery of retinal hemorrhages and a subdural hematoma in the subject child when he was hospitalized for seizures. Bronx County Family Court granted the 1028 motion and temporarily released both children to the parents. The parents' expert witness had examined the child twice, reviewed his hospital medical records and imaging, and explained how the child's injuries were most likely the result of dehydration, inflammation, and infection instead of head trauma. ACS's expert's conclusion that the child was abused lacked a connection with the actual findings on the

imaging and the child's symptoms and did not explain why the bleeding could not have been caused by a systemic issue.

[Matter of Caleb S. \(Gina R.\) \(2020 NY Slip Op 51623\[U\]\)](#)

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